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Supreme Court, U.S.
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No. 01-382

In the Supreme Court of the United States

TOM DORAN and MELBA GONZALES,
Petitioners,

v.

CHARLES C. CURRIER, as personal representative of the Estate of Anthony Michael Juarez, deceased; and DEVONNE ESPERANZA JUAREZ, as mother and next friend of Latasha Juarez, a minor,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether this Court should consider an absolute-immunity issue that was neither decided by, nor explicitly raised in, the district court or the court of appeals.

II. Whether this Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), immunizes social workers from constitutional liability for recklessly consigning children to the physical and legal custody of an obviously dangerous parent with whom the children never previously lived.

III. Whether this Court has jurisdiction to review the sufficiency of the evidence concerning the date when the children left the state's legal custody.

IV. Whether public officials who knowingly endanger citizens in ways not expressly explored by due process case law are entitled to qualified immunity.

LIST OF PARTIES

Petitioners

Tom Doran
Melba Gonzales

Respondents

Charles C. Currier, as personal representative of the Estate of Anthony Michael Juarez, deceased

Devonne Esperanza Juarez, as mother and next friend of Latasha Juarez, a minor

Other Parties to the Proceeding in the Tenth Circuit

All parties listed above were likewise parties to the Tenth Circuit appeal. Defendant-Appellant Shirley Medina was an additional party to the appeal, and she is also a Respondent to the conditional Cross-Petition for a Writ of Certiorari in this Court. Defendant-Appellant Regina Sentell was an additional party to the appeal. Defendant Kelly Robbins did not participate in the appeal but remains a party in the district court. The United States of America participated in the Tenth Circuit appeal as an amicus curiae in support of Defendants' petition for rehearing.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Charles C. Currier and Devonne Esperanza Juarez ("Plaintiffs") respectfully file this brief in opposition to the petition for a writ of certiorari.

JURISDICTION

Jurisdiction in the court of appeals existed by virtue of the collateral-order doctrine. Because the question of when the Juarez children left the state's legal custody (the third of Petitioners' "Questions Presented," and point III under "Reasons for Granting the Writ") implicates issues of "evidentiary sufficiency," the court of appeals lacked jurisdiction to consider it, as Plaintiffs will explain below. *See Behrens v. Pelletier*, 516 U.S. 299, 313 (1996); *Johnson v. Jones*, 515 U.S. 304 (1995).

STATEMENT OF THE CASE

A balanced and reasonably thorough statement of the facts appears in the "Facts and Procedural History" section of the court of appeals' opinion, which Plaintiffs incorporate herein by reference. *See* Appendix to the Petition for a Writ of Certiorari at 4-9 [hereinafter App.]. Petitioners truncate their factual summary by lopping off all events that occurred after October 1993, apparently on the theory that public officials are constitutionally free to create and enhance special dangers for children who have left state custody. In fact, between October 1993 and April 1994, Petitioners not only deepened the peril in which they had previously placed Anthony and Latasha Juarez, but repeatedly failed to rescue the children from that peril. *See id.* 6-7; [Plaintiffs'] Conditional Cross-Petition for Writ of Certiorari.

In addition to leaving out much of the relevant story, Petitioners misstate the facts in at least two respects. First, Petitioners assert that the children's court awarded Christopher Vargas physical custody of the children in May 1993 "[b]ased on the recommendation of social worker Medina." Petition for a Writ of Certiorari at 3 [hereinafter Petition]; *accord id.* at 14. Although Plaintiffs initially alleged that Medina's recommendation had led to the transfer of custody — and although the opinion of the court of appeals recited the original allegation, *see* App. 5 — Petitioners themselves demonstrated that Petitioner Doran, not Medina, bore responsibility for the change of custody, and Plaintiffs adopted that version of the facts in opposing Petitioners' request for qualified immunity. *See* 10th Cir. Aplt. App. at 153c, 155-56, 209. Thus, there is no substance to the contention that Vargas's acquisition of custody was a fait accompli before Petitioner Doran became involved. *See* Petition at 12, 14-16.

Second, Petitioners repeatedly refer to the "return" of physical and legal custody to Vargas. *See* Petition at 6-7. In fact, the children had never lived with Vargas before Petitioners placed them in that position. The present lawsuit is therefore quite different from *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), as the court of appeals explained at some length. *See* App. 23-27.

REASONS FOR DENYING THE WRIT

Petitioners offer up a mèlange of arguments in the evident hope that the Court will find something about the smorgasbord appetizing. But at least one of the proffered issues was never raised or decided below, and another lies beyond the reach of appellate jurisdiction. None of the

questions presented are worthy of the Court's attention.

I. Neither in the District Court nor in the Court of Appeals Did Petitioners Seek Absolute Immunity, nor Have They Ever Been Entitled to It.

Petitioners have begun their campaign for absolute immunity in this Court. In the district court they sought qualified immunity alone. *See* 10th Cir. Aplt. App. at 116, 307, 392. In the court of appeals, Petitioner Doran devoted a few pages of his opening brief to the citation of absolute-immunity precedents in support of his request for qualified immunity, *see* Appellants Tom Doran, Shirley Medina and Regina Sentell's Brief-in-Chief at 35-38, and Plaintiffs briefly addressed the argument in that context. But Doran's reply brief dropped the argument altogether, and once again focused exclusively on qualified immunity. *See, e.g.*, Appellants Doran, Medina and Sentell's Reply Brief at 26. Not surprisingly, the court of appeals adopted the same focus. Because this Court does not sit as a forum of first resort, it should decline to entertain the debut of Petitioners' bid for absolute immunity. *See, e.g.*, *Glover v. United States*, 121 S. Ct. 696, 701 (2001).

But even if the claim of absolute immunity had been properly raised and rejected below, this case would present no circuit conflict for the Court to untangle. If "social workers ... involved in civil family welfare proceedings[] can ever function as prosecutors for purposes of § 1983 immunity analysis," *Hoffman v. Harris*, 511 U.S. 1060, 1063 (1994) (Thomas, J., dissenting from denial of certiorari), the social workers in this case did not. Courts have cautioned that "absolute immunity is not appropriate [when] ... child welfare workers normally are to report findings of neglect or abuse,

even those which might indicate a need for immediate intervention, to other authorities for ... advocacy in the form of initiation of court proceedings." *Snell v. Tunnell*, 920 F.2d 673, 690 (10th Cir. 1990). For instance, in *Miller v. City of Philadelphia*, 174 F.3d 368 (3d Cir. 1999), the Third Circuit distinguished its earlier decision in *Ernst v. Child & Youth Services*, 108 F.3d 486 (3d Cir. 1997) — on which Petitioners prominently rely, *see* Petition at 8 n.1, 10 — and refused to accord absolute immunity to a social worker who had merely transmitted information to a children's court attorney, because the attorney was ultimately responsible for presenting evidence and recommendations to the court. 174 F.3d at 376 n.6; *accord, e.g.*, *Williams v. Hauser*, 948 F. Supp. 164, 166 (D. Conn. 1996).

A similar division of labor prevails in the children's courts of New Mexico. "In cases involving civil abuse or civil neglect ..., the attorney selected by and representing the [human services] department is the children's court attorney." N.M. Stat. Ann. § 32A-1-6(C) (1999). That attorney is charged with deciding whether to seek the court's assistance in cases of suspected abuse or neglect. *See id.* § 32A-4-15. Indeed, in the court of appeals, Petitioners persistently sought to defend their conduct on the ground that it was the children's court attorney who had possessed and exercised the determinative discretion not to proceed with a custody petition. *See, e.g.*, Appellants Tom Doran, Shirley Medina and Regina Sentell's Brief-in-Chief at 13, 37; Appellant Melba Gonzales' Brief-in-Chief at 6-7, 14, 26, 28, 44-45. As social workers who supplied the attorney with information — or who failed to do so — Petitioners were no more entitled to share in the attorney's immunity (whatever the scope of that immunity might have been) than is a complaining witness who induces a prosecutor to indict, *see Malley v. Briggs*, 475 U.S. 335, 339-43 (1986).

Moreover, in each precedent cited by Petitioners, absolute prosecutorial immunity is justified by the "serious danger that the decision to [initiate prosecution] will provoke a retaliatory response." *Butz v. Economou*, 438 U.S. 478, 515 (1978). Each one revolves around an allegation that a prosecutor's malice, or a social worker's excessive zeal, led to an unjust conviction or some other unwarranted exercise of the state's coercive power. This case is significantly different. Although Plaintiffs' complaint alleges in the alternative that the children's court issued custody orders on Petitioner Doran's "recommendation," an important aspect of the claim is that Doran remained *silent* about crucial information whose revelation might have saved the children from private violence, even to the point of failing to attend the hearing at which the court awarded legal custody to Vargas. *See* App. 5, 28.[1] In the cases cited by Petitioners, the rationale for absolute immunity is that "those involved in judicial proceedings should be given every encouragement to make a full disclosure of all pertinent information within their knowledge." *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983) (internal quotation marks omitted). More particularly, while "we want our child welfare workers to exercise care in deciding to interfere in parent-child relationships," "we do not want them to be so overly cautious ... that they fail to intervene in situations in which children are in danger."

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[1] This is not to suggest that the only claims against Petitioners concern communications, or failures to communicate, with the children's court. On the contrary, the allegations range far beyond the judicial process. *See, e.g.*, App. 7. Social workers enjoy absolute immunity, if at all, "only when they are acting in their capacity as *legal advocates* — initiating court actions or testifying under oath — not when they are performing administrative, investigative, or other functions." *Holloway v. Brush*, 220 F.3d 767, 775 (6th Cir. 2000) (en banc).

Ernst v. Child & Youth Servs., 108 F.3d at 496; *see also Millspaugh v. County Dep't of Pub. Welfare*, 937 F.2d 1172, 1177 (7th Cir. 1991) (absolute immunity accorded to social workers seeking removal of children from parents' custody "induces the parties to present all arguments to [the children's court]"), *cited in* Petition at 9 n.1. In this case, the same rationale favors liability, not immunity. *Cf. also Briscoe*, 460 U.S. at 339-40 (distinguishing between "pro-defendant" and "pro-prosecution" perjury, and suggesting that civil rights laws might provide a remedy for "perjury resulting in unjust *acquittals*," which had "the effect of preventing effective enforcement of the laws"); *Holloway v. Brush*, 220 F.3d 767, 777 (6th Cir. 2000) (en banc) ("A jury could reasonably find that [the defendant social worker] appropriated the entire judicial process to herself by ... feeding [the court] inaccurate information by ... omission ....").

To Plaintiffs' knowledge, no federal court has granted absolute immunity to social workers whose interactions with the judicial system have amounted to complicity in child abuse. Hence in *Camp v. Gregory*, 67 F.3d 1286 (7th Cir. 1995), the court found it "significant" that a social worker "allegedly misrepresented to the [children's] court that all was well," thereby "effectively prevent[ing] any independent assessment by that court." *Id.* at 1296. And in *Chrissy F. v. Mississippi Department of Public Welfare*, 925 F.2d 844 (5th Cir. 1991), the court explicitly denied absolute immunity to an actual *prosecutor* who had failed "to comply with his obligation to report allegations of abuse to the Youth Court." *Id.* at 849-51; *see also id.* at 849-52 (denying immunity to social worker who "knowing[ly] prepar[ed] for [a] Youth Court hearing ... a report that omitted all references to plausible evidence of abuse" of plaintiff by her natural father).

In short, even if Petitioners had made their demand for absolute immunity in the lower courts — and even if it had survived the "necessary historical inquiry" into "whether social workers enjoyed absolute immunity for their official duties in 1871," *Hoffman v. Harris*, 511 U.S. at 1062 (Thomas, J., dissenting from denial of certiorari) — Petitioners could not have shown that this lawsuit targets their performance of prosecutorial functions or otherwise subverts the judicial process. They are left with the argument that cloaking social workers with absolute immunity would be a good idea. *See* Petition at 11. But "[t]he federal courts 'do not have a license to establish immunities from § 1983 actions in the interests of what [they] judge to be sound public policy.'" *Hoffman*, 511 U.S. at 1063 (Thomas, J., dissenting from denial of certiorari) (quoting *Tower v. Glover*, 467 U.S. 914, 922-23 (1984)).

II. The Fact-Dependent Ruling That Plaintiffs Have Adequately Alleged Petitioners' Unconstitutional Endangerment of the Children Does Not Warrant This Court's Review.

Petitioners filed their qualified-immunity motions at a time when discovery had been confined by court order to a single narrow issue — namely, the date when the state had ceded legal custody of the children to their father, Christopher Vargas. *See* App. 5, 8, 75-79. Because the motions went well beyond the particular *DeShaney* argument that such limited discovery was designed to illuminate, *see id.* 60, the district court treated them as motions to dismiss. Thus, the question facing the district court and the court of appeals was whether "it appear[ed] beyond doubt that [Plaintiffs could] prove no set of facts in support of [their] claim which would entitle [them] to relief." *Id.* 22 (quoting *Conley v. Gibson*,

355 U.S. 41, 45-46 (1957)). More specifically, under *Siegert v. Gilley*, 500 U.S. 226 (1991), the initial question was whether Petitioners' alleged conduct between May 1993 and April 1994 *could have* constituted a violation of the children's civil rights — "depending, of course, on further context as provided by discovery," App. 31.

Petitioners purport to subdivide this fact-bound inquiry into four additional questions, *see* Petition at 12 — the answers to which will supposedly settle for all time "the degree to which, or manner in which, [a] state actor must be involved in creating [a] danger for [substantive due process] liability to exist, [and] how immediate the danger must be in order for the doctrine to apply," *id.* at 13-14. Precisely what Petitioners want this Court to decide (beyond reversing the judgment below) is unclear. What is clear is that none of it amounts to a concrete and substantial issue deserving of High Court review.

A. This case does not present the principal question Petitioners seek to argue.

The second of Petitioners' "Questions Presented" is whether the danger-creation doctrine contemplates constitutional liability when social workers "caus[e a] court to award legal custody to [a] natural father of children already in [the] father's physical custody." Petition at 11 (capital letters omitted); *see id.* at i. But as Plaintiffs have explained, *see supra* p. 2, the children were not "already" in their father's physical custody when Petitioners first encountered them. Petitioner Doran helped put them there, in the face of information that should have given him pause. *See, e.g.*, App. 4-5. Far from merely "be[ing] aware of the dangers that [the children] faced in the free world," Petitioners

"played [a] part in their creation." *DeShaney*, 489 U.S. at 201.[2]

B. Even on the facts hypothesized by Petitioners, the decision below would not conflict with *DeShaney*.

Petitioners insist that if they merely caused the state to surrender legal custody of children who were already in a natural parent's physical custody, this lawsuit "is indistinguishable from *DeShaney*." Petition at 15. Not so. The plaintiffs in *DeShaney* "concede[d] the State played no part in creating [the danger]." 489 U.S. at 197. Plaintiffs in this case make no such concession. By taking affirmative steps to remove state oversight of the children's home life — despite worrisome evidence that the children were being physically abused — Petitioners "interfere[d] with the

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[2] Citing *State v. Sanders*, 628 P.2d 1134 (N.M. Ct. App. 1981), Petitioners argue that a biological parent has an immediate and inalienable right to the custody of his children — no matter how long he has ignored that right — and that, consequently, Petitioners' delivery of the children to the custody of their father accomplished nothing more than the outcome that otherwise would have obtained under state law. *See* Petition at 15. *Sanders* fails to support the notion that an absentee parent can suddenly assume control over the lives of his children and spirit them away from the home of their sole caregiver whenever it suits him. But even if the case supported that proposition, it would not help Petitioners. Custodial rights exist only to the extent that they have not "been terminated, however temporarily, by appropriate authority." *Sanders*, 628 P.2d at 1137. By the time Petitioner Doran acted to turn the children over to their father, they were firmly ensconced in state custody.

protective services which would have otherwise been available in the community," *Freeman v. Ferguson*, 911 F.2d 52, 54 (8th Cir. 1990), and "frustrate[d] the efforts of other private persons and public officials to improve [the children's] situation," *Camp v. Gregory*, 67 F.3d at 1296.

Nor do Plaintiffs seek to hold Petitioners accountable for "passive conduct" or a "mere failure to protect." Petition at 21. The Juarez children were in the state's protective custody — not in a state of nature — when Petitioners first intervened in their lives. The state's custody did not lapse through inaction, but ended as a result of Petitioners' recommendations (as well as their concealment of material information from the children's court). Thus, this case presents "a relatively straightforward application of the [danger creation] doctrine." App. 41. It represents no departure from *DeShaney*, and it creates no serious dissonance among the decisions of the circuits.[3]

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[3] Petitioners contend that the decision specifically clashes with two Eleventh Circuit cases supposedly holding "that danger is not created when a child in the physical custody of a parent or relative is injured by that person, even if the state has legal custody." Petition at 19; *accord id.* at 29-30. Even if conflict with the decisions of a single circuit were significant, both cases are distinguishable. In *Wooten v. Campbell*, 49 F.3d 696 (11th Cir. 1995), the state restored physical custody to the parent who had originally enjoyed it. *See id.* at 698. In *Powell v. Georgia Department of Human Resources*, 114 F.3d 1074 (11th Cir. 1997), the state likewise effectuated the "return" of a child to a natural parent, *see id.* at 1078, 1080, and never assumed custody of the child in any meaningful sense, *see, e.g., id.* at 1080. Here, by contrast, Anthony and Latasha Juarez were in their mother's custody until the state took them away. Absent the state's intervention, their father would never have gotten his hands on

C. Consistently with circuit precedent, Plaintiffs have alleged an immediate threat of harm.

Petitioners argue that the court of appeals has staked out a uniquely lenient position on proximate cause in § 1983 cases, because "[e]ven assuming legal custody was not transferred until October 1993, the injury occurred in April 1994, six months later." Petition at 22. While it is true that Anthony was not doused with boiling water, and Latasha's whole-body bruising was not discovered, until six months after the custody change, Plaintiffs have alleged that the children were beaten continuously in the interim. *See* App. 6-7; 10th Cir. Aplt. App. at 70-71. In any event, all that the case law on state-created danger requires is the conscious disregard of a *risk* of immediate harm. *See* Petition at 22 (citing *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1262 (10th Cir. 1998)). Whether the risk immediately materializes is beside the point.

The cases cited by Petitioners are not to the contrary. In *Martinez v. California*, 444 U.S. 277 (1980), this Court held that murder was "too remote a consequence" of a parole board's decision, not merely because five months elapsed between the state's act and the parolee's, but also because "the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger." *Id.* at 285. Thus, in *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993), the court decided that police officers could be held liable for endangering the traveling public as a whole, as long as "the immediate threat of harm ha[d] a

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them.

limited range and duration." *Id.* at 1127. By contrast, Petitioners in the present case knew that Anthony and Latasha "were members of a limited and specifically definable group," App. 30 (internal quotation marks omitted) — the only two people in the world whose safety in the home of Christopher Vargas was at issue. There was nothing "too remote" about the injuries they ultimately suffered at his hands. *See also L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992) (apparently having nothing to say on the topic of "close temporal proximity"), *mis-cited in* Petition at 22.

III. The Question Whether the Juarez Children Remained in the State's Legal Custody Between June and October 1993, Whatever Its Implications for the Development of American Constitutional Law, Is Not Properly Before This Court.

Petitioners complain that the district court and the court of appeals both refused to "determine that, based on orders entered by the New Mexico children's court and transcripts of hearings, legal custody transferred to [the children's father] in June, 1993," Petition at 24; and they even undertake to furnish this Court with some of the evidence that the Court might find useful in formulating its own findings on the subject, *see* App. 82-99. They explain that the date of the custody change is "critical to [their] ... defense." Petition at 23. They do not explain why that date — or the lower courts' alleged error in failing to determine it — should matter to anyone else.

But even if the issue's significance transcended the present case, this Court would have no occasion to consider it. In the first place, as the court of appeals pointed out in denying Petitioners' request for a rehearing, Petitioners

"conceded to the district court, for purposes of the order being appealed, that the October 19, 1993 date was when legal custody transferred to the father." App. 81. Try as Petitioners might, *see* Petition at 24 n.5, they cannot turn back the clock on that concession.

Under the collateral-order doctrine, moreover, the district court's denial of qualified immunity was appealable only to the extent that the appeal presented "neat abstract issues of law." *Johnson v. Jones*, 515 U.S. at 317 (internal quotation marks omitted). "[T]he appealable issue [was] ... whether the facts alleged ... support[ed] a claim of violation of clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 528 n.9 (1985). Whether the facts alleged were adequately supported by the evidence — whether, in other words, "[the] record demonstrate[d] a 'genuine' issue of fact for trial," *Johnson v. Jones*, 515 U.S. at 316 — was a question on which the appellate court had no power to pass. The court of appeals lacked jurisdiction over such questions even though the failure to make a sufficient factual showing in response to a motion for summary judgment ought to result in judgment "as a matter of law." Fed. R. Civ. P. 56(c).

Plaintiffs have alleged — on the basis of a children's court order of July 14, 1993, *see* App. 93-95, as well as other orders, transcripts, rules of procedure, contemporaneous accounts of interested observers, and the surrounding circumstances, *see, e.g.*, 10th Cir. Aplt. App. at 137a, 141, 149-51, 188-89, 244, 249, 251 — that the Juarez children remained in the state's legal custody until October 19, 1993. Whether in fact they did, notwithstanding a June 1993 order implying otherwise, is by no means a "neat abstract issue[] of law." *Johnson v. Jones*, 515 U.S. at 317. Indeed, it is not an issue of law at all — except insofar as the district court may eventually be required to resolve it in *Plaintiffs'* favor, under

"the rule that when there are two conflicting judgments rendered by a court upon the same rights of the same parties that which is later in time prevails." *Nichols v. Nichols*, 648 P.2d 780, 784-85 (N.M. 1982). Whatever the power of a federal "enforcing court" to interpret an ambiguous consent decree entered in federal litigation, *see EEOC v. Safeway Stores, Inc.*, 611 F.2d 795, 798 (10th Cir. 1979), *cited in* Petition at 25, "[w]hat has been adjudicated in a prior suit [in New Mexico] is often a question of fact, which ... has to be subjected to parol evidence and referred to a jury." *Lemon v. Morrison-Knudsen Co.*, 277 P.2d 542, 546 (N.M. 1954) (internal quotation marks omitted).

Considering the "conflicting evidence" about the date when the state relinquished legal custody, App. 28 n.6, the district court found the issue to be "hotly dispute[d]," *id.* 59. The court assumed the truth of Plaintiffs' allegation that the state's legal custody persisted until October 19, 1993, because it deemed the issue both factual and "genuine." Fed. R. Civ. P. 56(c). Even if that conclusion were dead wrong, it would be unreviewable here. Even if the district court had failed to "exercise its discretion in a way that protect[ed] the substance of the qualified immunity defense," *Crawford-El v. Britton*, 523 U.S. 574, 597 (1998), *cited in* Petition at 23, 26, no appeal from that misstep would lie. *See, e.g.*, *id.* at 595 (Court has "declined to craft an exception to settled rules of interlocutory appellate jurisdiction and rejected the argument that the policies behind the immunity defense justify interlocutory appeals on questions of evidentiary sufficiency"); *Johnson v. Jones*, 515 U.S. at 316-18 (appellate courts reviewing denials of qualified immunity cannot entertain "questions about whether or not a record demonstrates a 'genuine' issue of fact for trial," even though avoidance of such questions may "undercut the very policy (protecting public officials from lawsuits) that ... militates in

favor of immediate appeals").

Petitioners' fallback theory — that "[i]f the children's court orders are ambiguous ..., then [Petitioners] are entitled to qualified immunity based on their objectively reasonable assumption that their department did not have legal or physical custody after June, 1993," Petition at 25 — fares no better. In the first place, Petitioners never made this argument to the district court. *See, e.g.*, 10th Cir. Aplt. App. at 397; *cf. Behrens v. Pelletier*, 516 U.S. at 313 ("Th[e] argument [that defendant's conduct was 'objectively legally reasonable'] was presented by petitioner in the trial court, and there is no apparent impediment to its being raised on appeal."). And in any event, the question here is not simply whether a given court order was "ambiguous," but whether it accurately reflected an ongoing series of judicial and administrative events in which Petitioners themselves were intimately involved. Did Petitioners actually and reasonably believe that a court order describing a disposition that never crossed the judge's lips at a hearing Petitioners attended — an order entered in violation of Petitioners' own rules of procedure, and contradicted by a second order from the same court a month later — released them from any constitutional responsibility for the Juarez children's safety? The district court would have been hard-pressed to decide these questions even if Plaintiffs had been permitted to conduct meaningful discovery on the subject, *see* App. 9-10. Certainly this Court cannot resolve them in the first instance.

IV. The Relevant Law Was Clearly Established.

Petitioners finally decry the court of appeals' determination that the constitutional rights at issue were clearly established. They declare that "the court cited no cases before 1993 distinguishing *DeShaney*'s ruling that return

of a child to a parent is not a civil rights violation," Petition at 29; but given that *this* case did not involve the "return of a child to a parent," *see supra* p. 2, it is unclear why Petitioners believe that the court of appeals was obligated to locate precedents somehow avoiding the effect of *DeShaney*. Petitioners assert that "the only similar case held that a failure to prevent harm did not constitute a substantive due process violation," Petition at 29; but again, because Petitioners are guilty of much more than a "failure to prevent harm," *see supra* pt. II(B), the significance of this observation is obscure.

Petitioners' criticism of the court of appeals' decision ultimately rests on the argument that

> [t]here are no prior cases cited by the [c]ourt ... which involved facts comparable to those at issue in this case, namely, the application of the state created danger doctrine to a social worker and his supervisor where the social worker recommended continuation of custody of minor children with their father despite bruises on the children and abuse allegations by their mother during the children's stay with their father.

Petition at 29. Though Plaintiffs reject the characterization of Petitioners' conduct as mere advocacy of the status quo, they will concede the crux of the argument: there has never been a reported case exactly like this one. But that, of course, is not the test of constitutional liability. Petitioners need not show that the fate met by the Juarez children was the second coming of an earlier catastrophe. That the governing principles must be "clearly established" does not mean "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful."

Anderson v. Creighton, 483 U.S. 635, 640 (1987).

Plaintiffs will not pretend that the sense in which the law must be clearly established in "danger creation" cases is either uncontroversial or unimportant. *See* [Plaintiffs'] Conditional Cross-Petition for Writ of Certiorari. But this is not a case on the margins. Anthony and Latasha Juarez were in the protective custody of the state. Petitioners had "a responsibility to oversee and supervise the[ir] safety and well-being." *Perkins v. Dep't of Human Servs.*, 748 P.2d 24, 29 (N.M. Ct. App. 1987). Ignoring explicit allegations of abuse and brushing aside the evidence of it, Petitioners cut off the children's access to "the protective services which would have otherwise been available in the community." *Freeman v. Ferguson*, 911 F.2d at 54. It simply cannot be said — on the face of Plaintiffs' pleadings, and "as a matter of law" — that these actions were "objectively legally reasonable." *Anderson v. Creighton*, 483 U.S. at 641.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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